In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1395

GRIFFIN & BRAND OF MCALLEN, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25–32) is reported at 471 F.2d 235. The opinion of the district court (Pet. App. 36–43) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33–34) was entered on January 4, 1973. A timely petition for rehearing *en banc* was denied on March 9, 1973 (Pet. App. 35). The petition for a writ of certiorari was filed on April 16, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

504-963—73——1

QUESTIONS PRESENTED

1. Whether petitioner is responsible under the Fair Labor Standards Act as an "employer" for the wages, hours and other working conditions of harvest hands who, although assembled and hired by others to work on petitioner's farms, are dependent upon petitioner as a matter of economic reality and perform services which are a necessary and integral part of its farming operations.

2. Whether the district court abused its discretion in granting injunctive relief against petitioner in the circumstances of this case.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, are set forth in the petition for a writ of certiorari (Pet. App. 46–49).

STATEMENT

The Secretary of Labor brought this action under Section 17 of the Fair Labor Standards Act (29 U.S.C 217) to enjoin petitioner from continuing to violate the Act's minimum wage, record keeping, child labor and shipping provisions with respect to migrant workers who work on the fruit and vegetable crops produced by petitioner for sale and shipment in interstate commerce.

Petitioner denied all responsibility for the violations, claiming that the harvest hands were employed, not by it, but by the crew leaders who assembled and transported them to and from petitioner's farms in the Rio Grande Valley. It further argued that injunc-

tive relief would be inappropriate in view of its good faith effort to help the crew leaders comply with the Act's standards.[1]

All of petitioner's defenses were rejected by the district court. On the independent contractor point, the court, after reviewing the evidence and the controlling decisions, found it "unnecessary to decide whether the 'crew leaders' are 'independent contractors' or 'employees' of [petitioner], for in the situation here presented, the result will be the same under the Act" in view of this Court's holding in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, that "where the work done, in essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act" (Pet. App. 38). In determining that an injunction should issue to restrain petitioner from continuing to violate the Act, the district court stated that "[a] person or corporation may not take an 'ostrich-like attitude' and still be in good faith under the Act" (Pet. App. 41).[2]

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[1] Petitioner also denied knowledge of any violations of the Act, and claimed that, in any event, the child labor violations were *de minimis*.

[2] With respect to the claimed lack of knowledge concerning the violations, the district court found that petitioner not only had the right to inspect the crew leaders' records at any time, but that its "relations with the harvest hands were such as to put it in the position to know or discover the wages paid to each 'crew member'" (Pet. App. 41). The court further found that petitioner "knew, or should have known, that * * * the 'crew leaders' were violating the child labor provisions of the Act" as well, and that the nine child labor violations discovered during the month of April 1970 were not *de minimis* (Pet. App. 41–42).

In affirming, the court of appeals approved the district court's findings as not "clearly erroneous," both expressly (Pet. App. 30–31) and by quoting extensively from the trial court's memorandum decision (Pet. App. 26–28). In addition, it noted that there was testimony indicating "that [petitioner], through its field supervisors, exercises considerable control over the crew leaders and the harvest workers"; for example, petitioner's head field supervisor tells the crew leaders at what hour to begin work, assigns them a specific area to harvest each day according to the number of members in the crew, and determines "the rate at which they should pay the harvest workers * * *." Moreover, petitioner's field supervisors "oversee the harvest work in the fields each day and give instructions to the crew leaders, who pass them on to the harvest workers" (Pet. App. 28–29). See A. 289–290, 293, 330, 346, 348–349, 352, 368, 373–375, 382–384, 390–393, 397, 404.[3]

On the injunction point, the court of appeals noted that there had been past violations of the Act on petitioner's part, and that "[a]lthough an issue was created as to whether [petitioner] at all times acted in good faith reliance on advice of counsel, the district court was competent to evaluate the testimony and

[3] "A." references are to the Appendix filed in the court of appeals.

Although the harvest workers are paid by the crew leaders, the money for their wages and for all other operating expenses, such as gasoline, license tags for the crew leaders' trucks, and the scissors, knives and baskets used in the harvest operations, is advanced by petitioner (Pet. App. 27; A. 291–292, 302, 332, 353, 375, 378–379, 396–397, 403, 412, 417, 696, 701, 721).

determine the dependability of [petitioner's] promise of future compliance" (Pet. App. 31–32).

ARGUMENT

The decision below is correct. It does not present any novel legal issue, nor does it conflict with any decision of this or other courts. Further review is thus not warranted.

1. Although this is the first appellate case applying the minimum wage protection (extended to farm workers in 1967) to harvest workers, that result has also been reached by the only other court of appeals that has decided the question (*Hodgson* v. *Okada Farms, Inc.*, 472 F. 2d 965 (C.A. 10)) and is entirely consistent with the Fair Labor Standards Amendments of 1966, P.L. 89-601, 80 Stat. 830, 833. Protection was extended by those amendments to limit the former exclusion of agricultural employees from the minimum wage provisions of the Act. It has long been settled that persons exercising the degree of control over workers in other industries that petitioner exercises over the harvest workers here are "employers" within the meaning of the Act. See, *e.g.*, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; *Tobin* v. *Anthony-Williams Mfg., Co.*, 196 F. 2d 547 (C.A. 8); *Tobin* v. *La Dake*, 190 F. 2d 677 (C.A. 9); *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied, 333 U.S. 862. And on facts virtually identical to those presented here, the farmer has been held to be an

"employer" of the harvest workers hired under the crew leader system to work on his farm since these workers are, "as a matter of economic reality," dependent upon the farmer for their wages. *Fahs* v. *Tree-Gold Co-op. Growers of Florida*, 166 F. 2d 40, 44 (C.A. 5) (Social Security Act). See, also, *Mitchell* v. *Hertzke*, 234 F. 2d 183 (C.A. 10) (child labor provisions of Fair Labor Standards Act).[4]

Petitioner's contention that the harvest worker cannot be an employee of both the farmer and the crew leader (Pet. 12) is contrary to decisions recognizing the existence of a joint employment relationship. In *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481, the argument advanced by petitioner was rejected by this Court which stated, in interpreting the National Labor Relations Act, "[w]hether Greyhound [here Griffin and Brand] * * * qualif[ies] as a joint employer with Floors [here the crew leaders] is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves [here the harvest hands] occupy an independent contractor status." See, also, *Hodgson* v. *Okada Farms, Inc.*, 472 F. 2d 965 (C.A. 10); *Hodgson* v. *Arnheim and Neely, Inc.*, 444 F. 2d 609, 611–612 (C.A. 3), reversed on other grounds *sub nom. Brennan* v. *Arnheim and Neely, Inc.*, No. 71–1598, decided February 28, 1973. Accordingly, the court below never reached the question

[4] As the court below noted (Pet. App. 30), this Court has stated that decisions defining the employer-employee relationship for purposes of the National Labor Relations and Social Security Acts are persuasive in interpreting the Fair Labor Standards Act. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 723.

whether the crew leaders were "employees" or "independent contractors," and petitioner's assertion of a conflict with *United States* v. *Silk*, 331 U.S. 704, which, so petitioner claims, requires a holding that the crew leaders are independent contractors, is at best beside the point.

2. Although minimum wage protection was not extended to farm workers until 1967, the Act's child labor and shipping provisions previously applied to farmers and other employers of such workers (*Mitchell* v. *Hertzke*, *supra*), as did the provisions of the Social Security Act (*Fahs* v. *Tree-Gold Co-op. Growers*, *supra*). For more than 25 years, the courts have held the farmer responsible for adhering to these laws. As the Fifth Circuit pointed out in *Fahs*, where the farmer used workers hired by contractors who had full authority to set wages and fix hours of work and who paid their Social Security taxes, "statutory coverage [of these remedial laws] is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business for which they render service" (166 F. 2d at 44).

Petitioner's contention that industry custom should shield the farmer from any wage liability under the Fair Labor Standards Act not only is contrary to the established "economic reality" test, but would, we submit, substantially frustrate the stated intent of Congress, in enacting the Fair Labor Standards Amendments of 1966, to provide minimum wage protection to the employees of "large agri-business enterprises" (H.

Rep. No. 871, 89th Cong., 1st Sess. (26) and, in particular, to improve the plight of the migrant workers (112 Cong. Rec. 11308, 11391, 20484).

3. Petitioner's contention that the district court abused its discretion in granting injunctive relief ignores that court's findings, sustained by the court of appeals, that petitioner had not acted in good faith. Petitioner did not, as it claims, have a "perfect record of compliance" with the Fair Labor Standards Act (Pet. 22). The record is undisputed that petitioner had been investigated three times since 1969, that each investigation had disclosed violations which were discussed with petitioner's president, and that petitioner had been advised two years before suit was filed that it was responsible as an "employer" of the harvest workers for assuring that their employment was in compliance with the Act's minimum wage, record keeping and child labor provisions (A. 483–499, 516–529, 532, 539–542, 617–622, 624–626, 628, 630–631, 769).[5]

[5] Therefore, petitioner could not reasonably have continued to rely upon the opinion letters written in 1967 (Pet. App. 50–52). The assertion in the July 19, 1967 opinion letter that if a crew leader were an independent contractor, compliance with the Fair Labor Standards Act would not be the responsibility of the farmer is no longer the position of the Department, in light of the cases cited *supra*, at p. 6. In any event, it is clear from these letters that the identification, for purposes of the Fair Labor Standards Act, of the relationships between the farmer, the crew leaders, and the harvest workers in any given case must be based on an analysis of the total factual situation involved. Both courts below considered the total factual situation here, and properly concluded that petitioner was an employer of the harvest workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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